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No. 9992

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES EVAN FOWLER,
Appellant,

vs.

CALIFORNIA TOLL-BRIDGE AUTHORITY,
Appellee.

APPELLANT'S REPLY BRIEF.

DANIEL V. RYAN,
Russ Building, San Francisco,
THOMAS C. RYAN,
Hearst Building, San Francisco,
Attorneys for Appellant.

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I.

STATE FUNDS WERE NOT USED IN THE CONSTRUCTION OF THE BAY BRIDGE.

The appellee in his brief has not controverted the statement of the case set forth in appellant's brief; therefore, it is agreed by the parties that the main issue is still whether the appellee is a separate entity from the State of California or whether it is actually the State of California. On the decision of this issue depends the answer to the question whether there was a diversity of citizenship between the parties hereto.

Appellant relies on two cases as authority for its contention that the appellee is not a separate entity from the state but is in reality the State of California.

They are: *Kansas City Bridge Company v. Alabama Bridge Corporation,* 59 Fed. (2d) 48 and *State Highway Commission of Arkansas v. Kansas City Bridge Company,* 81 Fed. (2d) 689. Appellant respectfully contends that the factual situation in said cases materially differs from the factual situation existing in our case because the funds used to build the bridges in both instances were funds of the state and not of the bridge corporation. We quote from page 49 of the first mentioned case:

> "For the purpose of providing funds for building bridges, the corporation is authorized to borrow money by issuing bonds, which are to be attested by the Secretary of State and approved by the Governor. The interest on the bonds which are declared to be tax free, may be paid out of state funds derived from the gasoline tax or from the state convict fund."

In regard to the second of said cases, the State Highway Commission of Arkansas had no funds of its own. We quote from page 690 of said case:

> "The revenues available for meeting obligations incurred by that commission were State revenues."

We further quote:

> "Moreover, the purpose of this suit was to require the *State* to make pecuniary satisfaction for a liability which, it has been held, would make the suit one against the State."

In our case, state funds were not used in building the bridge. We quote from Section 4 of the Cali-

fornia Toll Bridge Authority Act (Statutes 1929, page 1489, Act 956, Deering's General Laws of California):

> "* * * and to pay for the same (the construction of the bridge) out of any fund or funds provided or made available by this act."
>
> Section 5. "All such bonds so authorized shall be issued in the name of the California Toll Bridge Authority and shall constitute obligations only of said California Toll Bridge Authority and shall be identified as toll bridge bonds and shall contain a recital on the face thereof that the payment or redemption of said bonds and the payment of the interest thereon is secured by a direct and exclusive charge and lien upon the tolls and other revenues of any nature whatever received from the operation of the particular toll bridge or bridges or other highway crossings for the acquisition or construction of which the bonds are issued and that neither the payment of the principal or any part thereof or any interest thereon constitutes a debt, liability or obligation of the State of California."

Section 5½ contains similar provisions in regard to bonds for obtaining funds to provide transportation facilities on the bridge. Section 5¾ contains similar provisions in regard to bonds for additional facilities. Section 6 contains provisions in regard to the issuance of the bonds, the form thereof and the execution and sale of said bonds.

Section 10 of said act provides:

> "Bonds issued under the provisions of this Act shall not constitute or be a debt, liability or ob-

> ligation of the state, and the payment of both principal and interest of all such bonds shall be secured only by the tolls or other revenues collected from the particular toll bridge or bridges or other highway crossings for which such bonds were issued, and other revenues and interest thereon and sinking funds created therefrom, received by the California Toll Bridge Authority, and shall be paid from such tolls or revenues or from such other contributions or appropriations as may be made available under the terms of this act."

The distinction between our case and the two Kansas City Bridge Company cases, above mentioned, is that in said cases state funds were used in the construction of the bridges, whereas in our case funds of the California Toll Bridge Authority were used. That same distinction is the basis of the difference in the authorities between the cases holding that the state is the real party in interest and those holding that the governmental agency is the real party in interest. That distinction is pointed out by the District Court of Pennsylvania in the case of *Hunkin-Conkey Construction Company v. Pennsylvania Turnpike Commission,* 34 Fed. Sup. 26, 29, cited in our opening brief at page 5 as the basis of its analysis of the various cases which the Court has analyzed. We quote therefrom:

> "This case is clearly distinguishable from the case of *State Highway Commission of Wyoming v. Utah Construction Company,* 278 U. S. 194, 49 S. Ct. 104, 73 L. Ed. 262. There, the construction contract was entered into in the name of the

state; the Commission did not have any funds of its own but received its funds from the State; the State alone would have been compelled to respond in damages in event of liability to the contractor. The only conclusion possible under such circumstances was that the State was the real party defendant.

In the case of *Kansas City Bridge Co. v. Alabama State Bridge Corp.,* 5 Cir., 59 F. 2d 48, the State again supplied the funds to be used by the Bridge Corporation in the construction of the bridges and, in addition, the officers of the Bridge Corporation were officials of the State who acted without compensation in addition to their official salaries.

State Highway Commission v. Kansas City Bridge Co., 8 Cir., 81 F. 2d 689, is also a case in which the State was directly responsible for the liability which the suit was brought to establish, as the Commission had no funds of its own from which the damages could be paid."

II.

THE CALIFORNIA TOLL BRIDGE AUTHORITY WAS CREATED AS A CORPORATION AND A SEPARATE ENTITY FROM THE STATE.

Appellee concedes in its brief that the California Toll Bridge Authority is a corporation. (See page 21.) It was declared to be a public corporation by the Supreme Court of California in the case of *California Toll Bridge Authority v. Kelly,* 218 Cal. 7. As indicative of the fact that this corporation is a separate entity from the State of California, aside

from the fact that it is self-supporting and has its own funds, as pointed out in Point 1, is the fact that it functions as a corporation and a separate entity from the state as shown by the following facts:

(1) The state highway engineer may be appointed by the Authority to serve as *its* engineer in addition to his regular duties as state engineer; in other words, his duty as the engineer of the Authority is separate and distinct from his duty as engineer for the state.

(2) When acting as engineer for the Authority he is to receive additional salary, which is to be fixed by the Authority.

(3) The Authority may employ legal counsel,

(4) It may maintain an office,

(5) It may employ a secretary and such other persons as may be necessary, and finally,

(6) It may sue and be sued in its own name. All of these provisions are found in Section 3 of the Act.

The following section of the Act also indicates that the Authority is a separate entity from the state.

Section 4 provides that the Authority shall *authorize and direct* the Department of Public Works of the State to build toll bridges. Section 4½ provides that it shall *direct* the Department of Public Works to build transportation facilities on any bridge. Section 5 provides that when the Department of Public Works determines that it is for the best interests of the public highways in the state that a new toll bridge

be constructed, the director of said department shall submit its *recommendation* to that effect to the Authority. Said section further provides that if a majority of the members of the California Toll Bridge Authority concur in the recommendation of the Director of Public Works, the Authority shall adopt a resolution declaring that public interest will necessarily require the construction of such a toll bridge, and authorizing the issuance of revenue bonds for the purpose of obtaining funds in an amount not in excess of that estimated to be required for such construction.

Section 5½ also provides that the Department of Public Works shall make its *recommendation* to the Authority in regard to providing transportation facilities for bridges. Section 5¾ is to the same effect in regard to additional facilities. Section 7 provides that the Authority is empowered to fix the rate of toll of bridges.

As authority for the proposition that the California Toll Bridge Authority is a separate entity from the State, we cite *Louisiana Highway Commission v. Farnsworth,* 74 Fed. (2d) 910, 912 and 913, certiorari denied 294 U. S. 729, 79 Law. Ed. 1259. In discussing said case, the Court in *State Highway Commission v. Kansas City Bridge Co.* (supra), said at page 691:

> "We think that the true distinction between the case of *Louisiana Highway Commission v. Farnsworth* (supra) and *State Highway Commission of Wyoming v. Utah Construction Co.,* 278 U. S. 194, 73 Law. Ed. 262, is that in the former case the Federal Court had jurisdiction, not because the State Supreme Court had held that

the commission was a legal entity distinct from the state and subject to suit, but because, under the constitution and laws of Louisiana, it was such a legal entity and a citizen of Louisiana—while in the latter case the Highway Commission of Wyoming was a mere representative of the state. No such distinction can properly be made here."

We also quote from the *Farnsworth* case, cited above:

"The act granting the commission, made it a body corporate which could sue and be sued, and the Supreme Court of Louisiana has held that the commission was a legal entity from the state, not unlike a levee district, on the part of the commissioners of the State of New Orleans."

See also:

Annotation 306 U. S. 398, 83 Law. Ed. 794.

We quote from page 799 of 83 Law. Ed.:

"* * * And in *Tompkins v.Kanawaha Bd.,* 19 W. Va. 257, a case involving a corporate instrumentality of a state, it was said: 'The State as such, does not enter into business of any such character. Her business is political and when she wants improvements carried on, she creates corporations with the ordinary incidents thereto, to do that business. It would be against all our ideas of state government if a corporation created for the state to carry on a work of improvement, should not be liable like any other corporation, for the damage it inflicted, notwithstanding the state might own the property of the corporation."

We quote from page 810 of 83 Law. Ed.:

> "* * * it was held in *Biedermann v. Home Owners' Loan Corp.,* 20 Fed. Sup. 23, that the corporation was liable in an action for money damages for failure to deliver such bonds as agreed, inasmuch as the statute creating the corporation provided broadly that it might sue and be sued, and contained no limitation that for a breach of its agreement to deliver bonds it could be sued, only for specific performance."

On pages 814 and 815 of 83 Law. Ed., cases are cited which hold that where a state or the U. S. confers upon a governmental corporation, either expressly or by implication, the conventional power "to sue and be sued", it thereby subjects it to liability in tort.

In discussing the case of *Keifer v. Reconstruction Finance Corporation,* 306 U. S. 387, 83 Law. Ed. 784 (cited in our opening brief), the annotation at page 816 of 83 Law. Ed. states:

> "However, in this connection, attention is again called to the observation made in the Keifer case that Congress has exhibited a settled policy against immunity of Federal corporations from suit, and that where the power to sue and be sued is given, this ordinarily should include liability to suit in tort as well as in contract."

Appellee concedes this on page 23 of his brief when he states that the California Supreme Court is not as liberal as the Federal Courts in allowing suits against governmental corporations. In this connection it should be noted that the Federal Court will rely on Federal decisions in deciding whether or not

it has jurisdiction in a certain case based on grounds of diversity of citizenship.

See also:

Federal Housing Administration v. Burr, 309 U. S. 242, 84 Law. Ed. 724.

The case of *Pacific Fruit Co. v. Oregon Liquor Commission,* 41 Fed. Sup. 175, cited on page 23 of appellee's brief, is not authority for the proposition that the appellee in this action is in reality the State of California. That case involved a suit to recover amounts paid by plaintiff for the privilege of doing business in malt syrup in the State of Oregon. The Court stated on page 179 thereof:

> "The Oregon Liquor Control Commission is not a corporation. It is a governmental or administrative body and as such, constitutes an arm or alter ego of the state itself."

An analysis of all the cases on this subject leads to the conclusion that the only authority on all fours, so to speak, with our case, is the case cited in our opening brief, to-wit:

Hunkin-Conkey Construction Company v. Pennsylvania Turnpike Commission, cited above. The act creating the Pennsylvania Turnpike Commission is almost exactly the same as the act creating the California Toll Bridge Authority. In both acts it was provided that the costs of the bridge or turnpike should be paid from revenue bonds which were not to be deemed a debt of the State of California or of the commonwealth of Pennsylvania. In both acts it was provided that the authority or commission should

have power to enter into contracts, employ engineers, architects, inspectors and attorneys and such other employees as may be necessary in their judgment, and with the authority to fix their compensations. In both acts it was provided that the actual construction of the structures should be under the supervision of the Department of Highways of the State of California and the State of Pennsylvania respectively, subject to the proviso that all contracts and agreements should be subject to the approval of the Toll Bridge Authority and Turnpike Commission respectively. Both acts provided that upon the completion of the improvement, the Authority or the Commission should fix the amount of tolls and employ men to collect them. The language used by the District Court of Pennsylvania, after quoting the provisions of the Pennsylvania act, can with equal force be applied to our case (p. 28):

> "From the provisions of the act, as above outlined, it is clear that the commonwealth of Penna. has so divorced the defendant commission from the state, that this action is one involving a legal entity distinct from the state, and the state itself is only indirectly interested in the turnpike."

III.

THE DEPARTMENT OF PUBLIC WORKS WAS THE AGENT OF THE TOLL BRIDGE AUTHORITY IN THE CONSTRUCTION OF THE BRIDGE.

Appellee makes the bald assertion in his brief (p. 11) that the bridge was not built by the Toll Bridge Authority, but rather by the Department of

Public Works. However, the following sections of the act indicate that the Authority was the principal and the Department of Public Works was the agent in the construction of the bridge.

Section 3 of the statute provides that the Director of the Department of Public Works of the State of California is a member of the Board known as the California Toll Bridge Authority. The act further provided that the State Highway Engineer may be appointed by the California Toll Bridge Authority to serve as *its* Chief Engineer in addition to his regular duties as State Highway Engineer, at an additional salary as may be fixed by the California Toll Bridge Authority.

Section 4 of the act provides:

> "The California Toll Bridge Authority shall *authorize* and *direct* the Department of Public Works to build toll bridges."

Section 4½ provides:

> "Whenever in the opinion of the California Toll Bridge Authority and in the opinion of the Department of Public Works it is necessary or desirable so to do, the California Toll Bridge Authority shall *authorize* and *direct* the Department of Public Works to build * * * transportation facilities of any toll bridge * * *."

Section 5:

> "Whenever the Department of Public Works determines that it is for the best interests of the public highways in the state that a new toll bridge * * * be constructed * * * the Director of said department shall submit its *recommendation* to that effect to the California Toll Bridge

> Authority * * * If a majority of the members of the California Toll Bridge Authority concur in the recommendation of the Department of Public Works, the Authority shall adopt a resolution declaring that public interest and necessity require the construction of such toll bridge * * * and authorizing the issuance of revenue bonds for the purpose of obtaining funds in an amount not in excess of that estimated to be required for such construction."

Section 5½ is to the same effect as Section 5 in regard to acquiring transportation facilities for the bridge.

Section 5¾ is to the same effect as Section 5 in regard to constructing additional transportation facilities for the bridge.

Section 8:

> "The Department of Public Works shall have full charge of the acquisition and construction of all such toll bridges and other toll highway crossings as *may be authorized* by the California Toll Bridge Authority * * *."

From these provisions of the act, it is clearly patent that by the very terms of the statute the Department of Public Works was the agent of the California Toll Bridge Authority in the construction of the bridge. The rule of law is so fundamental that a principal is responsible and liable for the acts of its agent, that it needs no citation of authority herein.

The act clearly shows the intent of the legislature that the Department of Public Works should become an instrumentality, or agent, of the Authority in the construction of the bridge. Appellee glosses over this

point and fails to truly evaluate the significance of the fact that at all times the Board of Public Works is the agent of the Authority.

Therefore, on the authority of the *Pennsylvania Turnpike* case, plus the *State of Missouri v. Homestead Life Association,* 90 Fed. (2d) 543, cited in our opening brief (p. 8), appellee has failed to answer or distinguish, and the U. S. Supreme Court cases cited in our opening brief, enunciating the principle that governmental corporations are liable to suit, we respectfully maintain that the California Toll Bridge Authority is a legal entity separate and apart from the State of California. We also believe that when the legislature of the State of California stated in the act creating the Authority, that it was liable to suit, it meant exactly that. There are no words of limitation on the extent of the Authority's liability to suit. Therefore, the appellant in this action had a right to sue said Authority for the claim herein maintained. The California Toll Bridge Authority, being a corporation, is a citizen of California *(Barrow Steamship Co. v. Kane,* 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964, cited in our opening brief, p, 11) and, therefore, there was a diversity of citizenship between the parties hereto and the District Court did have jurisdiction to try this case.

Dated, San Francisco,
March 6, 1942.

Respectfully submitted,
DANIEL V. RYAN,
THOMAS C. RYAN,
Attorneys for Appellant.